HARMAN MINING CORP.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 84-279 Decided June 28, 1985

Appeal from decision by Administrative Law Judge David Torbett vacating notices of violation Nos. 83-13-25-6, 83-13-25-7, and 83-13-25-8.
Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Roads: Generally

A road used for hauling coal or as access to a mine must be included in a permit unless an operator shows that: (1) the road has been duly established as a public road according to the laws of the jurisdiction in which it is located; (2) there is substantial (more than incidental) public use of the road; and (3) the road is actually maintained with public funds in a manner similar to other public roads in the vicinity. The decision of the Administrative Law Judge vacating notices of violation issued to an operator for utilizing roads not properly permitted will be affirmed where the record contains evidence to support his conclusions that the roads are public roads within the meaning of the regulation.

APPEARANCES: Glenda R. Hudson, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Joseph W. Bowman, Esq., and E. K. Street, Esq., Grundy, Virginia, for Harman Mining Corporation.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from the December 30, 1983, decision of Administrative Law Judge David Torbett vacating notices of violation (NOV's) Nos. 83-13-25-6, 83-13-25-7, and 83-13-25-8 issued to Harman Mining Corporation (Harman). The NOV's charged Harman with conducting surface coal mining operations without a required permit in that unpermitted access/haul roads were being utilized for access and coal haulage from three mines. Judge Torbett dismissed

the NOV's because he found that the coal hauling roads cited in the NOV's were public roads. 1/

The issue in this appeal is whether Harman was required to obtain a permit for three roads utilized for access and hauling coal from three mines. The mines themselves are already subject to valid permits. Pursuant to a provision of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1291(28)(B) (1982), "all lands affected by the * * * improvement or use of existing roads to gain access to the site" constitute "surface coal mining operations" for which a permit must be obtained, as required by 30 U.S.C. § 1256 (1982), with respect to surface coal mining operations, and 30 U.S.C. § 1266(b)(10) (1982), which concerns surface effects of underground coal mining operations. On April 5, 1983, the Department amended the definition of "affected area" set forth at 30 CFR 701.5 to include

> all areas covered by new or existing roads used to gain access to, or for hauling coal to or from, surface coal mining and reclamation operations, except as provided in this definition * * *. The affected area shall include every road used for purposes of access to, or for hauling coal to or from, surface coal mining and reclamation operations, unless the road (a) was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction, and (c) there is substantial (more than incidental) public use.

48 FR 14821-22 (Apr. 5, 1983).

The above-quoted amendment to the regulation is the culmination of careful consideration by OSM. The proposed rulemaking of January 4, 1982, 47 FR 44-46, and August 2 of that year, 47 FR 33425, 33430-31, provide a detailed exposition of the policy considerations involved in adopting this regulation, with particular emphasis on evidence of legislative intent. It is not necessary to repeat all of that information here. The legislative history quoted in those proposed rulemakings provides evidence of serious congressional concern about the environmental damage attributable to coal

1/ Judge Torbett's decision also vacated NOV's issued to South Atlantic Coal Company (South Atlantic) for failure to obtain permits for certain roads over which coal was hauled. In its statement of reasons, OSM acknowledged that South Atlantic's roads satisfied three of the four criteria for public roads, the sole issue being whether a fourth criterion was satisfied. As to Harman, OSM maintained on appeal that it failed to demonstrate that its roads met any of the four criteria for qualification as a public road under Virginia law. During the pendency of this appeal, OSM approved an amendment to the Virginia regulatory program deleting the fourth criterion required to establish a coal haulage road as a public road. 49 FR 9898 (Mar. 16, 1984). Subsequently, OSM filed a motion to withdraw its appeal with respect to South Atlantic, because South Atlantic's haulage roads now satisfied the definition. The Board granted this request and dismissed OSM's appeal with respect to South Atlantic by order dated May 1, 1984.

haul roads. Moreover, it is quite plain that Congress recognized that public roads might become subject to regulation under SMCRA, depending on the extent to which the roads are actually used for mine access and coal haulage. Thus, under the regulatory definition, a road may be a public road for purposes of local administration yet nevertheless be subject to the requirement that an operator obtain a permit for the road to use it for mine access and coal hauling. This is because satisfaction of any one of the elements of the definition for public road might be sufficient to classify that road as a public highway for the purposes of local administration such as enforcement of traffic laws. See generally, 39A C.J.S. Highways §§ 1-2 (1976). However, a public road must meet all three criteria to be exempt from regulation under SMCRA. Harman's assertion that the roads are considered public roads under certain provisions of Virginia law unrelated to surface mining has no dispositive significance in the instant appeal, except, perhaps, in determining whether the roads were designated as public roads, pursuant to the laws of the jurisdiction in which the roads were located.

[1] This regulatory definition had not bee published when the three mines were first inspected. Nevertheless, Virginia had previously been directed to revise its policy with respect to coal haul and access roads to insure that such roads would be part of the affected area unless they met all the above three criteria plus one additional criterion which became no longer applicable. 46 FR 61100 (Dec. 15, 1981). 2/ Virginia adopted a regulatory definition of public road that corresponded to the revision required by the Department. This is set forth under Chapter 23, § 2.02(p) of the approved Virginia program:

> Public Road - For the purpose of this chapter, a road will be considered a public road and exempt from permit acreage computations under Section 3.01 of these regulations when:
>
> (1) The road has been duly established as a public road according to the laws of the jurisdiction in which it is located;
>
> (2) there is substantial (more than incidental) public use of the road; [and]
>
> (3) The road is actually maintained with public funds in a manner similar to other public roads in the vicinity. [3/ /]

This definition governs the disposition of this appeal. 4/

2/ The deletion of the fourth criterion was approved during the pendency of this appeal. 49 FR 9898 (Mar. 16, 1984).

3/ See note 2, supra.

4/ Harman argues that this definition is not controlling because it does not appear in Chapters 17 or 19 of Virginia's program which pertain to operations subject to SMCRA but instead appears in Chapter 23 which pertains to operations of less than 2 acres and not subject to Federal regulation. This argument ignores the simple fact that the definition was offered by the State and accepted by the Department as applicable to operations subject to SMCRA. 48 FR 17561 (Apr. 22, 1983); see also 48 FR 46028, 46030 (Oct. 11, 1983).

Judge Torbett found that each of the three roads involved in this appeal met all three of the necessary criteria. Appendix A to his decision states:

> The undersigned having considered the testimony, exhibits, and administrative record offered as evidence by the applicant and the respondent, and having considered the proposed findings of fact and conclusions of law submitted by the parties, and having considered the entire record in this case, makes the following finding of fact relative to the roads concerning the Harman Mining Corporation case.
>
> 1. Jess Fork, Burnt Poplar, and Big Log Branch roads are public roads in that each of them have been duly established as a public road according to the laws of the jurisdiction in which they are located, there is substantial (more than incidental) public use of each of these roads and these roads are actually maintained with public funds in a manner similar to other public roads in the vicinity.
>
> 2. Portions of Jess Fork have been paved by the Buchanan County and the county has current plans to pave additional portions thereof (Tr. 156, 190-91). The road has served the general public and other commercial businesses located along Jess Fork Road, including a commercial cable television antenna and gas wells and transmission lines (Tr. 216-17, 238-40). The road has been utilized by the general public for in excess of 20 years to expedite travel between State Routes 609 and 610 (travel between intersections of Jess Fork with routes 609 and 610 requires three times the travel distance if Jess Fork is not used) (Tr. 154, 157-58, 204-05, 238-39), for travel to a county land fill (Tr. 216-17), and for travel to areas with seasonal recreational activities such as hunting (Tr. 240).
>
> 3. Burnt Poplar Road has been in existence for an excess of 45 years (Tr. 236). The road has been used by the public, has been maintained by the Buchanan County Board of Supervisors with public funds, and has been worked by the county for more than 20 years (Tr. 158, 186, 236-37). The road is usually worked by the county three times per year (Tr. 188). The work is most often performed at the request of residents who live along Burnt Poplar Road and the road serves four or five households (Tr. 160-61, 185-87), at least one of which is located above the intersection of applicant's permitted access road and Burnt Poplar Road (Tr. 208). Burnt Poplar was traveled by commercial timbering businesses prior to any coal mining operations being located along Burnt Poplar Road (Tr. 236, 238). The mine located on applicant's permit area off Burnt Poplar Road did not begin operations until the fall of 1981 and has not operated since May 1982 (Tr. 280). It is not disputed but the access and haul roads leading from the mine to the public road of Burnt Poplar Road was constructed and has been permitted by applicant (Tr. 280).

4. Big Log Branch Road, in addition to serving as an access for the general public to areas for recreational activities such as hunting (Tr. 241), serves six to eight families located in residences situated along Big Log Branch * * * Road (Tr. 189). The road is and has been worked by the Buchanan County Board of Supervisors as a public road, at public expense, at the request of residents living along Big Log Branch Road for an excess of 20 years (Tr. 157-58, 188). A portion of Big Log Branch Road has been paved by Buchanan County and the county has current plans to pave additional sections thereof (Tr. 156, 190-91). Big Log Branch Road has been in existence for an excess of 83 years and has been opened and used by the general public during that entire period of time (Tr. 241-42), and was used prior to the establishment of any coal mines along said road for other purposes including commercial timbering (Tr. 241). The mine operation of applicant's permit off Big Log Branch Road began in July 1981 and there have been no operations thereon since January 1982 (Tr. 280). The access and haul roads leading from the minesite to Big Log Branch Road is included in applicant's permit area (Tr. 280).

5. Buchanan County is a rural county in its topography is characterized by steep mountainous terrain (Tr. 189, 234-35). Between the mountains are hollows such as Burnt Poplar and Big Log Branch which are level enough to permit the construction of residences and other dwellings (Tr. 189, 234-35). The topography prevents any dense concentration of settlements in any area, and homes and businesses are widely scattered throughout the county along creek and riverbanks (Tr. 189-90, 234, 235). As a consequence, most county roads adjoin only a limited number of residences and businesses, and many are dead ends as a consequence of the steep terrain at the end thereof.

6. The majority of public roads in Buchanan County are not paved (Tr. 190), and the public county roads are often poorly maintained. The roads in issue are in better condition than the majority of county public roads (Tr. 164, 191). This is in large part explained by the fact that the three roads in question are maintained by Buchanan County with special coal haul road funds in addition to general county funds (Tr. 191). Coal haul road funds cannot be expended on any road which is not a public road (Tr. 164, 196-97).

7. Many state and Federal public roads in Buchanan County do not meet the road performance standards of the Virginia Permit Regulatory Program (Tr. 282-85).

The record provides support for Judge Torbett's determinations that the three roads were duly established as public roads according to the laws of the jurisdiction in which they are located and that they are maintained with

public funds in a manner similar to other public roads in the vicinity. We think there is also probative evidence in the record to support the finding that there is substantial public use of each of these roads within the meaning of the regulation. While evidence established that there is some public use of each of these roads, OSM contends that this evidence is not sufficient to determine whether that use was incidental or substantial. In their brief on appeal concerning this issue, OSM maintains that a finding on substantial public use depends on the relationship between the volume of public use and the volume of traffic using the road for hauling coal or access to the mine. Under such a standard it would necessarily follow that no finding of substantial public use can be made where the record contains no evidence comparing the volume of public use with the volume of traffic using the road for hauling coal or access to the mine. The record in this appeal is utterly devoid of evidence setting forth volumes of traffic using the road for mine access as distinguished from public use. The preamble to the proposed regulations in the discussion on Roads and the Affected Area considered this issue. The standard recited therein, is not that as advanced by OSM on appeal.

In addressing the issue, the preamble states:

> OSM agrees that frequent use may impose an unreasonable level of public use required under the rule. Rather, OSM intends to use the phrase "Substantial [more than incidental]" to indicate the necessary level of public use. Application of this standard will necessarily relate to uses of roads of a similar classification in the surrounding area.

47 FR 33431 (Aug. 2, 1982).

Under this standard, Judge Torbett could make a finding of substantial public use so as to vacate the NOVs. A mine operator carries the burden of proof for establishing an exception to the Act. See generally Harry Smith Construction Co. v. OSM, 79 IBLA 27, 29-30 (1983), and cases cited therein. Judge Torbett's findings that Harman did so is supported by the record.

We need not consider Harman's assertions that OSM had no authority to issue the subject NOV's because the violation did not involve an imminent danger and such authority would otherwise exist only when the Federal Government has taken over enforcement of the State's program or on other circumstances not pertinent here. We note, however, when an inspector finds a violation while conducting an inspection pursuant to 30 U.S.C. § 1267(a) (1982), subsection (e) of that section requires him to "inform the operator in writing." The issuance of a NOV is consistent with this statutory responsibility. 5/

5/ At any rate, it is not clear that Harman is on firm ground in its contention that no imminent danger is involved. Inasmuch as use of a haul road may constitute a surface coal mining operation, conducting such activity without a permit by definition constitutes "a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm" under 30 CFR 843.11(a)(2), unless one of the two exceptions provided in that subsection applies.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I am in agreement with the majority decision herein, I wish to more specifically address OSM's contention that Harman Mining Corporation has failed to establish that the roads in question were not coalhaul roads subject to permitting under either 30 U.S.C. § 1256 (1982) or 30 U.S.C. § 1266(b)(10) (1982). In particular, I wish to address OSM's contention that Harman has failed to show that there is substantial public use of the road or that the road is actually maintained with public funds in a manner similar to other public roads in the vicinity.

OSM's argument proceeds along the following lines. Under the applicable precedent, i.e., Jewell Smokeless Coal Corp., 4 IBSMA 51 (1982), an individual attempting to avoid permitting of a road on the ground that it is excepted from coverage as a "public road" bears the burden of affirmatively establishing that the road is a public road within the meaning of the applicable statute and regulations. From this premise OSM continues that, since both substantial public use and actual maintenance are necessary elements in order to avoid the ambit of SMCRA, appellant must show, inter alia, that there is more than incidental public use and that the road in question is actually maintained with public funds in a manner similar to other roads in the vicinity. OMS suggests that Harman has not carried its burden of persuasion on either of these issues.

While I have no difficulty in conceding that, as a general proposition, those who claim an exemption or who raise an affirmative defense (see Harry Smith Construction Co. v. Office of Surface Mining Reclamation and Enforcement, 78 IBLA 27 (1983)) have the burden of establishing their entitlement, given the specific factual milieu disclosed in the instant case, I cannot agree that Harman was required to establish either of these two elements.

It is important to keep in mind that at the time the Notices of Violation (NOV's) were issued, it was necessary to meet four criteria under Chapter 23 of the approved Virginia program in order to exempt a road from the purview of the program as a "public road." Thus, Chapter 23, § 2.02(p) provided:

> Public Road - For the purpose of this chapter, a road will be considered a public road and exempt from permit acreage computations under Section 3.01 of these regulations when:
>
> (1) The road has been duly established as a public road according to the laws of the jurisdiction in which it is located;
>
> (2) There is substantial (more than incidental) public use of the road;
>
> (3) The road is actually maintained with public funds in a manner similar to other public roads in the vicinity; and

> (4) The county within which the road is located has performance standards at least as stringent as the applicable minimum standards as stated in the Coal Surface Mining Reclamation Regulations adopted pursuant to Chapter 19, Title 45.1 of the Code of Virginia.

It is obvious that the first three standards are replications of the amended Federal regulatory language excepting public roads from the definition of "affected area" set forth in 30 CFR 701.5. The fourth standard, however, finds no counterpart in the Federal regulations. Indeed, one of the main points which OSM originally argued was that this case was a key test of OSM's ability to enforce state program regulations which were more stringent than those provided in the Federal program. As noted by the majority, however, the deletion of this fourth criterion was approved by OSM during the pendency of the appeal (48 FR 9898 (Mar. 16, 1984)), and, thus, this question is no longer presented by this appeal.

My disagreement with the position advanced by OSM, at least insofar as the instant case is concerned, relates to its assertion that Harman was required to show that the roads in question met criteria 2 and 3. The reason for my conclusion that it was not required to do so in this case can be crystallized by a brief recapsuling of the transcript of the hearing.

At the hearing, the OSM inspector, Bill Arnett, reviewed the bases for the issuance of the NOV's for each specific road. The first road was the Burnt Poplar Road. The following colloquy occurred between Government counsel and Arnett:

> Q. [By Mr. Morris] Given the DMLR's [Division of Mined Land Reclamation] response that this was a public road, why did you issue the Notice of Violations?
>
> A. Going by the four criteria, after discussion with my supervisors and solicitors, we felt that it didn't meet the criteria.
>
> Q. Which one specifically?
>
> A. Well, in discussing it with the solicitors, there is a question as to if it was a duly established as a public road and also, that the road was not maintained up to the standards of the State Program.

(Tr. 17-18).

Subsequently, having testified under cross-examination that he had spent a total of 2 to 3 hours on the road, counsel for Harman inquired further:

> Q. [By Mr. Street] You feel like that gave you the basis for determining how much public use that had been made of a road if you had been there two or three hours of your life?

A. Well, the main reason that it was cited was that I didn't base it on public use.

Q. And so, as far as you know, there may be public use of the road then?

A. Well, I didn't see any reason that there would be but . . .

Q. Well, let's go back to the first question then.

JUDGE TORBETT: Well, he didn't see any reason; he has already testified that he didn't see any reason that there was, and so, you have established that. Go on.

Q. (By Mr. Street) And why did you cite it if you didn't cite it because it failed to failed to come up to the public use requirement?

A. The main reason was for talking with our solicitors, if there is a question as to whether it was; that it met that first criteria as far as being really established and also that the road was not maintained up to the, at the minimum standards of the Virginia State Program.

(Tr. 32-33).

Similar testimony was elicited with reference to both the Big Log Branch Road and the Jess Fork Lick Branch Road. Thus, with respect to the Big Log Branch Road, Arnett stated:

I determined that, it was basically the same as on the last road. There was some question as to whether it met the first criteria as far as being duly-established and also the fourth criteria as far as it wasn't maintained to the standard of the permanent program regulations of Virginia.

(Tr. 60). See also Tr. 91. As to the Jess Fork Lift Branch Road, when asked why he had issued the NOV, Arnett responded: "It was the same as the other roads; for the first and fourth criteria; for the first, it was questionable about it being a public road; and the fourth" (Tr. 115).

I think it is difficult to read the entire transcript without reaching the conclusion that OSM was waiving any question of compliance as to the second and third criteria. Indeed, while there were isolated references to doubts that Arnett might have concerning public use and the expenditure of public funds, Arnett consistently reiterated his contention that the reason that Harman was cited for not permitting these roads was that it was felt that they did not meet the first and fourth criteria of the Virginia definition.

While it may be true that, as a general proposition in vacuo, an individual seeking to establish that an exception is applicable must prove

that such is the case, where one side, in effect, concedes that certain elements of the definition may have been met but specifically challenges the existence of other necessary elements, the obligation of the individual seeking to establish the exemption to prove the existence of the elements not being specifically challenged dissipates. A similar rule has been invoked by this Board in the past.

Thus, we have held that, as a general rule, a Government mineral examiner has an obligation to physically examine each mining claim as a precondition to the establishment of a prima facie case that the claim is invalid because of a lack of a discovery. However, when an expert in the employ of the claimant informs the mineral examiner that certain of the claims are of no value, the obligation of the Government mineral examiner to physically examine those claims in order to establish a prima facie case of invalidity evaporates, since the examiner has a right to rely on the admissions of the expert. United States v. Copple, 81 IBLA 109 (1984). I believe a similar approach is properly applied herein.

A contrary rule would result in a requirement that an individual prove each element necessary to an exception even where OSM expressly conceded the existence of certain of the elements. Such a rule would needlessly extend hearings without any discernible benefit accruing to either the Government or the individual or, alternatively, prove a snare for the unsuspecting counsel who failed to realize that, notwithstanding OSM's assertions to the contrary, he was obligated to establish all necessary elements of an exception, even where OSM never contravened the existence of some of them.

It was, of course, not necessary for Arnett to establish that any of the roads did not meet criteria two or three. But, I do think that in order for this Board to require that Harman show that these criteria were met, there should, at a minimum, be an assertion by Arnett that his belief that the roads did not meet either of the criteria animated his decision to issue the NOV's at issue. In the instant case, far from expressing such a view, Arnett basically agreed that these two criteria did not serve as a basis for issuance of the NOV's. This being the case, I do not think this Board could justify reversal of the judgment below on Harman's failure to affirmatively prove either public use or public maintenance of the roads. I agree with the majority that, based on the present record, Administrative Law Judge Torbett's decision should be affirmed.

James L. Burski
Administrative Judge